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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 CHRISTINE L. MARTIN,

11 Plaintiff,

12 v.

13 MICHAEL J. ASTRUE, Commissioner
14 of the Social Security Administration,

15 Defendant.

CASE NO. 11cv5586-JRC

ORDER ON PLAINTIFF'S
COMPLAINT

16 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
17 Local Magistrate Judge Rule MJR 13. (See also Notice of Initial Assignment to a U.S.
18 Magistrate Judge and Consent Form, ECF No. 5; Consent to Proceed Before a United
19 States Magistrate Judge, ECF No. 7.) This matter has been fully briefed. (See ECF Nos.
20 15, 16, 17.)
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22 After considering and reviewing the record, the undersigned finds that despite the
23 fact that the ALJ provided a detailed summary of the facts and some of the medical
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1 evidence, in order to find that plaintiff could perform work, the ALJ relied on a
2 hypothetical situation presented to the vocational expert that differed from the residual
3 functional capacity (“RFC”) determination included in her written decision. The
4 hypothetical situation presented to the vocational expert also differed from the physical
5 capacities evaluation on which the ALJ’s RFC determination relied. Therefore, this
6 matter shall be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g)
7 for further administrative proceedings.
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9 BACKGROUND

10 Plaintiff, CHRISTINE L. MARTIN, was born in 1971 and was thirty-five years
11 old on her alleged onset date of disability of January 4, 2007 (see Tr. 150). Plaintiff had
12 been working as a para-transit driver for over six years when she suffered an on-the-job
13 injury to her right foot (see Tr. 20, 243-44). Plaintiff’s MRI revealed changes consistent
14 with significant peritenosynovitis and a longitudinal tear of her posterior tibial tendon
15 (see Tr. 20). As summarized by the ALJ, “under the care of a treating podiatrist, Gavin
16 Smith, D.P.M., the claimant used cast immobilization, anti-inflammatories, and foot
17 orthosis without relief” (id.). Plaintiff’s continued to experience significant and persistent
18 foot pain (Tr. 20-21).
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20 Plaintiff underwent surgical tendon repair in June, 2007 (Tr. 21). However,
21 plaintiff’s residual tendon pain remained, worsening with weight-bearing and ambulation
22 (id.). Thereafter, a second tendon repair occurred in March, 2008, again resulting in
23 plaintiff’s immobility (id.). Plaintiff subsequently sustained a lumbar strain and a right
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1 calf strain due to a motor vehicle accident (id.). She also had an MRI demonstrating
2 degenerative changes, among other things (id.; see also Tr. 320-21).

3 PROCEDURAL HISTORY

4 Plaintiff filed applications for disability insurance benefits and supplemental
5 security income on October 31, 2007 (see Tr. 16, 150-60). Plaintiff's claims were denied
6 initially and following reconsideration (Tr. 95-98, 101-06). Plaintiff's requested hearing
7 was held before Administrative Law Judge Ruperta M. Alexis ("the ALJ") on October
8 20, 2009 (Tr. 34-90).

9
10 On February 8, 2010, the ALJ issued a written decision in which she found that
11 plaintiff suffered from the severe impairments of a right foot sprain, status post two
12 repairs of the right foot tendon; degenerative disc disease of the lumbar spine; and,
13 depression (Tr. 20). In addition, the ALJ found that although plaintiff was disabled within
14 the meaning of the Social Security Act from January 4, 2007 through December 30,
15 2008, the ALJ found that on December 30, 2008, "medical improvement occurred that is
16 related to the ability to work, and the claimant has been able to perform substantial
17 gainful activity from that date through the date of this decision" (Tr. 16-17, 22). On June
18 23, 2011, the Appeals Council denied plaintiff's request for review, making the written
19 decision by the ALJ the final agency decision subject to judicial review (Tr. 1-5). See 20
20 C.F.R. § 404.981.

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22 On July 29, 2011, plaintiff attached a complaint, filed on August 3, 2011, to her
23 motion for leave to proceed *in forma pauperis*, challenging the ALJ's written decision
24 (see ECF Nos. 1, 3). On October 12, 2011, defendant filed the sealed administrative

1 record pertaining to this matter (“Tr.”) (see ECF No. 10). In her Opening Brief, plaintiff
2 raises the following issues: (1) whether or not the ALJ’s residual functional capacity
3 (“RFC”) finding as presented to the vocational expert incorporated all of plaintiff’s
4 limitations; (2) whether or not the ALJ’s decision that plaintiff had experienced medical
5 improvement was supported by substantial evidence; and (3) whether or not the proper
6 remedy for the ALJ’s errors is a remand for an award of benefits (see ECF No. 15, pp. 2,
7 11-12).

8 STANDARD OF REVIEW

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10 Plaintiff bears the burden of proving disability within the meaning of the Social
11 Security Act (hereinafter “the Act”). Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir.
12 1999); see also Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995). The Act defines
13 disability as the “inability to engage in any substantial gainful activity” due to a physical
14 or mental impairment “which can be expected to result in death or which has lasted, or
15 can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C.
16 §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if plaintiff’s
17 impairments are of such severity that plaintiff is unable to do previous work, and cannot,
18 considering plaintiff’s age, education, and work experience, engage in any other
19 substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
20 1382c(a)(3)(B); see also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

21
22 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
23 denial of social security benefits if the ALJ's findings are based on legal error or not
24 supported by substantial evidence in the record as a whole. Bayliss v. Barnhart, 427 F.3d

1 1211, 1214 n.1 (9th Cir. 2005) (*citing* Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir.
2 1999)). “Substantial evidence” is more than a scintilla, less than a preponderance, and is
3 such ““relevant evidence as a reasonable mind might accept as adequate to support a
4 conclusion.”” Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting* Davis v.
5 Heckler, 868 F.2d 323, 325-26 (9th Cir. 1989)); *see also* Richardson v. Perales, 402 U.S.
6 389, 401 (1971). Regarding the question of whether or not substantial evidence supports
7 the findings by the ALJ, the Court should ““review the administrative record as a whole,
8 weighing both the evidence that supports and that which detracts from the ALJ’s
9 conclusion.”” Sandgate v. Chater, 108 F.3d 978, 980 (1996) (per curiam) (*quoting*
10 Andrews, supra, 53 F.3d at 1039). In addition, the Court ““must independently determine
11 whether the Commissioner’s decision is (1) free of legal error and (2) is supported by
12 substantial evidence.”” *See* Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2006) (*citing*
13 Moore v. Comm’r of the Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002)); Smolen
14 v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

16 According to the Ninth Circuit, “[l]ong-standing principles of administrative law
17 require us to review the ALJ’s decision based on the reasoning and actual findings
18 offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what the
19 adjudicator may have been thinking.” Bray v. Comm’r of SSA, 554 F.3d 1219, 1226-27
20 (9th Cir. 2009) (*citing* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (other citation
21 omitted)); *see also* Stout v. Commissioner of Soc. Sec., 454 F.3d 1050, 1054 (9th Cir.
22 2006) (“we cannot affirm the decision of an agency on a ground that the agency did not
23 invoke in making its decision”) (citations omitted). In the context of social security
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1 appeals, legal errors committed by the ALJ may be considered harmless where the error
2 is irrelevant to the ultimate disability conclusion. Stout, supra, 454 F.3d at 1054-55
3 (reviewing legal errors found to be harmless).

4 DISCUSSION

- 5 1. The hypothetical presented to the vocational expert differed from the
6 ALJ's residual functional capacity ("RFC") determination and did not
7 include necessarily all of plaintiff's functional limitations.

8 To determine whether or not a claimant's disability has ceased, the ALJ must
9 follow an eight-step evaluation process for a Title II claim and a seven-step process for a
10 Title XVI claim. 20 C.F.R. §§ 404.1594(f), 416.994(b)(5). At step one (Title II only), the
11 ALJ must determine whether or not the claimant is engaging in substantial gainful
12 activity. 20 C.F.R. §§ 404.1594(f)(1). At step two of the Title II sequential analysis, and
13 step one of the Title XVI sequential analysis, the ALJ must determine whether or not a
14 claimant has an impairment or combination of impairments that meets or medically
15 equals "the severity of an impairment listed in appendix 1 of subpart P of part 404 of this
16 chapter [20 C.F.R.]." 20 C.F.R. §§ 404.1594(f)(2), 416.994(b)(5)(i).

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18 Next, (step three, Title II/ step two, Title XVI), the Commissioner must determine
19 whether or not there has been any medical improvement in the claimant's condition. 20
20 C.F.R. § 404.1594(f)(3); see also 20 C.F.R. §§ 404.1594(a), 416.994(b)(5)(ii). Medical
21 improvement is "any decrease in the medical severity of [the claimant's] impairment(s)
22 which was present at the time of the most recent favorable medical decision that [the
23 claimant was] disabled or continued to be disabled." 20 C.F.R. § 404.1594(b)(1), (f)(3).
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1 Subsequently, (step four, Title II/ step three, Title XVI), the ALJ must determine
2 whether or not medical improvement is related to the ability to work, “i.e., whether or not
3 there has been an increase in the residual functional capacity.” 20 C.F.R. §§
4 404.159(f)(4), 416.994(b)(iii). If there has been no medical improvement or the medical
5 improvement is not related to the claimant’s ability to work, at step five, the ALJ next
6 considers whether or not an exception to medical improvement applies. 20 C.F.R. §§
7 404.1594(f)(5), 416.994(b)(5)(iv). At step six of the Title II analysis, (step five, Title
8 XVI), the ALJ must determine whether or not the claimant’s current impairments in
9 combination are severe. 20 C.F.R. §§ 404.1594(f)(6), 416.994(b)(5)(v). At step seven of
10 the Title II sequential analysis, (step six, Title XVI), the ALJ assesses claimant’s residual
11 functional capacity and determines whether or not she can perform her past relevant
12 work. 20 C.F.R. §§ 404.1594(f)(7), 416.994(b)(5)(vi); Social Security Ruling (“SSR”)
13 82-61, 1982 WL 31387. If the ALJ reaches the final step in the sequential analysis, the
14 burden shifts to the Commissioner to prove that the claimant can perform other work in
15 the national economy, given her age, education, residual functional capacity (“RFC”) and
16 past work experience (see Response Brief, ECF No. 16, p. 6). Cf. Bowen v. Yuckert, 482
17 U.S. 137, 146 n.5 (1987); see also 20 C.F.R. §§ 404.1594(f)(8), 416.994(b)(5)(vii).

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19 Prior to the final step, the burden to prove disability and continuing entitlement to
20 disability benefits is on plaintiff. Cf. Bowen, supra, 482 U.S. at 146 n.5 (1987); see also
21 42 U.S.C. § 423(f)(1); 20 C.F.R. §§ 404.1594, 416.994. However, there must be
22 substantial evidence that medical improvement has occurred. 42 U.S.C. § 423(f)(1).
23 According to the federal statute, any “determination made under this section shall be
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1 made on the basis of the weight of the evidence and on a neutral basis with regard to the
2 individual's condition, without any initial inference as to the presence or absence of
3 disability being drawn from the fact that the individual has previously been determined to
4 be disabled." Id.

5 The Court already has discussed the medical record supporting the ALJ's finding
6 of plaintiff's disability from January 4, 2007 through December 30, 2008, including
7 persistent tendon pain and lumbar strain and right calf strain due to a motor vehicle
8 accident, see supra, BACKGROUND (Tr. 20-22). The ALJ found that from "January 4,
9 2007 through December 30, 2008, the claimant's statements concerning the limiting
10 effects of her symptoms are generally credible" (Tr. 21). However, the ALJ found that
11 medical improvement was evidenced by "a comprehensive performance based physical
12 capacities evaluation, sparse mention of right foot symptoms, minimal medical care, and
13 the claimant's full time school attendance and internship" (Tr. 22).

14 The ALJ discussed many of the relevant facts and evidence in her written decision.
15 The ALJ discussed factors relevant to plaintiff's mental limitations and her activities of
16 daily living (Tr. 22). She noted that plaintiff did most of the household chores, including
17 cooking, cleaning, and grocery shopping (id.). The ALJ also noted that plaintiff had
18 testified that she "drives and attends school full time, 4 days a week, and participates in
19 an internship 1 day a week" (id.). The Court notes that, as pointed out by defendant,
20 plaintiff has not challenged the ALJ's findings on plaintiff's credibility (see Tr. 23; see
21 also Opening Brief, ECF No. 15; Reply, ECF No. 17).

1 Next, the ALJ determined plaintiff's residual functional capacity ("RFC"), finding
2 that plaintiff had the RFC to perform less than the full range of sedentary work (id.). In
3 determining plaintiff's RFC, the ALJ adopted a contemporaneous, performance-based,
4 physical capacities evaluation conducted on December 29, 2008 and signed on December
5 30, 2008 (see Tr. 22, 23-24; see also Tr. 532-33).

6 The ALJ discussed treatment records indicating, among other things, that plaintiff
7 did not exhibit motor strength deficits, and later demonstrated a normal range of motion
8 (Tr. 24). The ALJ reviewed the MRI results and EMG test results, finding that they did
9 not support a more restrictive RFC than for a limited range of sedentary work (id.).
10

11 The ALJ next reviewed plaintiff's course of treatment, finding that it strongly
12 suggested that plaintiff experienced improvement in her symptoms (id.). In this
13 discussion, the ALJ included the following:

14 For example, the claimant testified that she underwent epidural steroid
15 injections for her back symptoms, but that as of October 2008 she
16 stopped taking medication for her right foot. The claimant testified that
17 she did not seek further care for her foot as evidenced by the sparse
18 mention of it in the medical record after 2008. While the claimant
19 continued to seek care for her back, advised treatment efforts have
20 largely been conservative (e.g. physical therapy, a home exercise
program, and weight loss) (internal citation to Exhibit 31F, p. 15).
Although the claimant continued to present with pain complaints, a
physical therapist reported that the claimant's lack of progress was due
to her being "very deconditioned" and non-compliant with her home
exercise program (internal citation to Exhibit 31F, p. 9).

21 (Tr. 24).
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1 The ALJ also found that other testimony by plaintiff was inconsistent with more
2 limiting systems, citing plaintiff's school attendance since September 28, 2008 (id.). The
3 ALJ added:

4 The claimant testified that she is pursuing her Associates degree as a
5 legal assistant and that she is scheduled to graduate in June 2010.
6 Moreover, the claimant testified that she planned to pursue certification
7 as a paralegal. The claimant testified that she attends school full time
8 Monday through Thursday from 8am to 3:45pm and that she has an
internship all day on Fridays. Additionally, the claimant testified that she
is able to drive. Such activity strongly suggests that the claimant has
been capable of performing a limited range of sedentary work.

9 (Tr. 24-25).

10 Regarding plaintiff's mental residual functional capacity, the ALJ noted "sparse
11 mention of depression with some question of partial remission with medication," and
12 found that such evidence did not support a finding of more limiting mental symptoms
13 (Tr. 25 (*citing* Exhibit 31F, p. 15)). The ALJ accorded greater weight to the medical
14 opinion from psychiatrist, Dr. David Lischner, M.D. that plaintiff could perform simple
15 and repetitive tasks, and discussed objective findings from his treatment records (Tr. 25).
16 The ALJ also accorded significant weight to the opinions of the State agency medical
17 consulting doctors, Drs. Peterson and Eather, and adopted them (id.).
18

19 Next, the ALJ discussed lay evidence provided by plaintiff's boyfriend and friend
20 and determined that "mild objective findings of the claimant's back condition and sparse
21 mention of the right foot," along with "the claimant's full time attendance at school and
22 weekly internship" strongly supported the ALJ's finding that plaintiff was capable of
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1 | some sedentary work (see Tr. 25). The ALJ provided germane reasons to give less weight
2 | to the lay testimony. See Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009).

3 | The ALJ provided a summary of her findings, that her RFC is “supported by the
4 | opinion of a physical capacities evaluator and the medical opinions of Dr. Lischner, Dr.
5 | Peterson, and Dr. Eather, and is consistent with the claimant’s school and internship
6 | participation” (Tr. 25). The ALJ’s review of the facts and medical evidence and her
7 | findings regarding plaintiff’s ability to work almost was sufficiently thorough.

8 | In order to find that plaintiff could have performed other work existing in the
9 | national economy, the ALJ relied on the vocational expert’s testimony (see Tr. 26-27).
10 | However, the hypothetical presented to the vocational expert differed from the residual
11 | functional capacity (“RFC”) determination included in the ALJ’s written decision and
12 | differed from the physical capacities evaluation on which the RFC relied (see Tr. 22-23,
13 | 72-73, 75-532-33). In addition, it does not appear that the ALJ was aware of this fact,
14 | demonstrated by her written decision in which she indicates that she “asked the
15 | vocational expert whether jobs exist in the national economy for an individual with the
16 | claimant’s age, education, work experience, and residual functional capacity as of
17 | December 31, 2008” (Tr. 26). However, as mentioned, the residual capacity as of
18 | December 31, 2008 as found in her written decision included the limitation that plaintiff
19 | “seldom lift 10 pounds” (Tr. 22), while to the vocational expert, the ALJ included that the
20 | hypothetical individual could “lift and carry 10 pounds occasionally” (Tr. 73). The
21 | vocational expert even repeated this particular functional limitation: “Ten pounds
22 | occasionally,” and the ALJ responded: “Right” (id.).

1 A hypothetical posed to a vocational expert by an ALJ must include all of a
2 claimant's limitations that are supported by substantial evidence in the record, as "an ALJ
3 is not free to disregard properly supported limitations." Robbins v. Comm'r of Soc. Sec.
4 Admin., 466 F.3d 880, 886 (9th Cir. 2006). Here, the hypothetical presented to the
5 vocational expert differed from the RFC determination included in the ALJ's written
6 decision and from the physical capacities evaluation on which the RFC relied (see Tr. 22-
7 23, 72-73, 532-33). Therefore, the Court cannot conclude that the ALJ did not
8 inadvertently disregard properly supported functional limitations. See Robbins, supra,
9 466 F.3d at 886. A hypothetical including all of the limitations in the RFC from the
10 ALJ's written decision may have resulted in a different answer from the vocational expert
11 as to whether or not plaintiff could perform other work existing in the national economy.
12 The ALJ relied on the vocational expert's testimony in order to find that plaintiff could
13 perform other work existing in the national economy (see Tr. 26-27). As a result, this
14 matter must be reversed and remanded to the Commissioner for further administrative
15 proceedings. See id.

17 2. Conflicting other medical evidence suggesting that plaintiff's condition
18 did not improve, but rather worsened, should be evaluated following
19 remand.

20 The Court notes that the ALJ failed to discuss evidence in the record, a physical
21 work performance evaluation by Ms. Julie Garner, PT, DPT, which can be interpreted as
22 suggesting that plaintiff's condition worsened in December, 2008 instead of improved
23 (see Exhibit 2F, i.e., Tr. 254-66; see also Opening Brief, ECF No. 15, pp. 10; Reply; ECF
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1 No. 17, pp. 1-3). The Court also notes that according to the relevant federal regulation, a
2 “determination that there has been a decrease in medical severity must be based on
3 changes (improvement) in the symptoms, signs and/or laboratory findings associated with
4 [the claimant’s] impairment(s).” 20 C.F.R. § 404.1594(b)(1). As the Court already has
5 determined that this matter should be remanded for further consideration, see supra,
6 section 1, this aspect of the record should be evaluated explicitly following remand of
7 this matter.

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9 3. This matter should be remanded for further administrative proceedings,
10 including a *de novo* hearing.

11 The Ninth Circuit has put forth a “test for determining when evidence should
12 be credited and an immediate award of benefits directed.” Harman v. Apfel, 211
13 F.3d 1172, 1178, 2000 U.S. App. LEXIS 38646 at **17 (9th Cir. 2000). It is
14 appropriate where:

15 (1) the ALJ has failed to provide legally sufficient reasons for
16 rejecting such evidence, (2) there are no outstanding issues that
17 must be resolved before a determination of disability can be
18 made, and (3) it is clear from the record that the ALJ would be
19 required to find the claimant disabled were such evidence
20 credited.

21 Harman, 211 F.3d at 1178 (*quoting Smolen v. Chater*, 80 F.3d 1273, 1292 (9th
22 Cir.1996)).

23 Here, outstanding issues must be resolved. See Smolen, 80 F.3d at 1292. The
24 medical record contains conflicts and is not conclusive that plaintiff remained disabled
and did not experience improvement.

1 The ALJ is responsible for determining credibility and resolving ambiguities and
2 conflicts in the medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998);
3 Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995). If the medical evidence in the
4 record is not conclusive, sole responsibility for resolving conflicting testimony and
5 questions of credibility lies with the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th
6 Cir. 1999) (*quoting* Waters v. Gardner, 452 F.2d 855, 858 n.7 (9th Cir. 1971) (*citing*
7 Calhoun v. Bailar, 626 F.2d 145, 150 (9th Cir. 1980))). Therefore, remand is appropriate
8 here to resolve conflicting evidence in the record. See Sample, *supra*, 694 F.2d at 642;
9 Reddick, *supra*, 157 F.3d at 722.

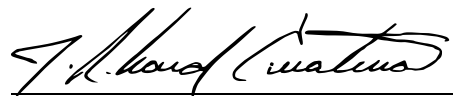
11 CONCLUSION

12 The ALJ relied on a hypothetical to the vocational expert in order to find that
13 plaintiff could work that differed from the residual functional capacity (“RFC”)
14 determination included in her written decision and differed from the physical capacities
15 evaluation on which the RFC relied. The ALJ also failed to discuss conflicting medical
16 evidence suggesting that plaintiff’s condition did not improve, but rather worsened.

17 Based on these reasons and the relevant record, the Court **ORDERS** that this
18 matter be **REVERSED** and **REMANDED** to the administration for further consideration
19 pursuant to sentence four of 42 U.S.C. § 405(g).

20 **JUDGMENT** should be for plaintiff and the case should be closed.

21 Dated this 7th day of March, 2012.

22 

23 J. Richard Creatura
24 United States Magistrate Judge